S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

ALLEN B. CURRIE, JR., Plaintiff-Appellant/Cross Appellee, v MOSIER INDUSTRIAL SERVICES CORP., Defendant/Third Party Plaintiff-Appellee/Cross Appellant, and CURRIE INDUSTRIAL SERVICES, L.L.C., Third Party Defendant.	UNPUBLISHED June 24, 2014 No. 314776 Calhoun Circuit Court LC No. 2011-003091-CK

Before: CAVANAGH, P.J., and OWENS and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right and defendant cross-appeals a judgment entered in plaintiff's favor in the amount of $41,572.63. We vacate the judgment and remand for proceedings consistent with this opinion.

On September 30, 2011, plaintiff filed a complaint against Mosier Industrial (defendant), alleging that they had entered into an agreement dated September 25, 2003, related to the liquidation of industrial equipment located in the Hayes-Albion industrial complex. The agreement was amended on February 24, 2004. Pursuant to the agreement and amendment, plaintiff was to receive payment from defendant related to the liquidation of the equipment. In the one-count breach of contract complaint, plaintiff alleged that he was not compensated in accordance with the terms of the agreement and amendment, which were attached to plaintiff's complaint.

Defendant responded to plaintiff's complaint with a motion for summary disposition, arguing that the six-year statute of limitations expired on June 30, 2010; thus, the breach of contract action was barred.

On November 28, 2011, plaintiff filed a first amended complaint which added as count II a breach of oral contract claim and as count III an unjust enrichment claim. Plaintiff alleged that, although the parties' agreement had expired by its own terms six months after its execution, plaintiff continued to perform and defendant continued to pay plaintiff for the work he performed until March 2006, about two years after the contract expired. On December 7, 2011, plaintiff filed a second amended complaint that was substantially the same.

On December 19, 2011, the trial court entered an order denying defendant's motion for summary disposition premised on the argument that plaintiff's action was time-barred.

On December 27, 2011, defendant filed a third-party complaint against Currie Industrial Services, LLC (Currie Industrial).[1] Defendant alleged that plaintiff was the owner of Currie Industrial and had been the Director of Environmental Affairs at Harvard Industries, Inc., an affiliate of Hayes-Albion Corporation. Defendant further alleged that because of plaintiff's employment at Harvard Industries, it was improper for him to directly profit from any transaction involving the Hayes-Albion industrial complex. In any case, the agreement between defendant and plaintiff expired on June 30, 2004, and was not renewed by the parties. Defendant's payments to plaintiff after that date were distributions related to the purchase of the "Melt Shop" building on the site by an uninvolved third-party, and were not related to the subject matter contemplated by the agreement between defendant and plaintiff. Further, defendant alleged, in 2008 it was determined that Currie Industrial had demolished additional buildings at the Hayes-Albion industrial complex without the direction and authority of defendant. The buildings demolished contained asbestos and subjected defendant to cleanup costs and fines totaling between $500,000 and $600,000. In count I, defendant alleged a negligence claim against Currie Industrial related to the unauthorized demolition of buildings containing asbestos. In count II, defendant sought contribution from Currie Industrial related to the financial harm resulting to defendant as a consequence of Currie Industrial's actions.

On July 19, 2012, plaintiff and Currie Industrial filed a motion for summary disposition pursuant to MCR 2.116(C)(10). They argued that: (1) the deposition testimony of Rodney Mosier, defendant's sole shareholder, confirmed that the parties continued to operate under their agreement although it had expired; (2) according to plaintiff's records, he was entitled to a one-half split of $289,944 of undistributed funds which totaled $144,944; and (3) Currie Industrial had no connection to this transaction because it was not a party to the agreement between plaintiff and defendant, and it performed no work at the industrial complex site. Accordingly, plaintiff argued that he was entitled to summary disposition on his claims against defendant and Currie Industrial argued that it was entitled to the summary dismissal of defendant's claims against it.

Defendant responded to the motion for summary disposition, arguing that plaintiff received all of the compensation to which he was entitled and, in fact, was overpaid by $110,200 under the terms of the original agreement. However, under the terms of the amendment to the agreement, at most defendant would owe plaintiff $2,299. Further, as a consequence of Currie

[1] To avoid confusion, we will refer to Mosier Industrial throughout this opinion as "defendant" and not "third-party plaintiff." We will also refer to Currie as "plaintiff" and "Currie Industrial" as "Currie Industrial" rather than third-party defendant.

Industrial's actions, defendant had to pay for mandatory remediation of the Hayes-Albion industrial site, which more than offset any monies owed to plaintiff.

Following oral arguments, the trial court granted summary disposition in favor of Currie Industrial on the record.[2] The trial court took under advisement plaintiff's motion requesting summary disposition on his breach of contract and unjust enrichment claims against defendant. Thereafter, on October 9, 2012, the trial court entered a written opinion granting plaintiff's motion for summary disposition, holding that "there is no genuine issue of material fact that the Plaintiff and Defendant entered into a binding agreement regarding the scrapping of metal and equipment from the former Hayes Albion Plant in Albion, Michigan, in September, 2003, and that the parties thereafter entered into a written amendment to said agreement in February, 2004." The court also held that there was neither a genuine issue of material fact regarding the terms of the contract, nor a genuine dispute that the parties mutually agreed to extend their contractual relationship beyond the expiration date. Further, the court rejected defendant's "statute of limitations argument" as meritless, and likewise rejected defendant's claim that plaintiff committed fraud on his then-employer, Harvard Industries. The trial court also rejected defendant's claims related to incurring costs for environmental cleanup related to Currie Industrial's activities, holding that defendant failed to present evidence that a genuine issue of material fact existed regarding such an agreement. The court concluded that plaintiff was entitled to $144,944.04 on his breach of contract claim and, because plaintiff's actual damages could exceed that amount, the matter was scheduled for a bench trial on damages.

On October 30, 2012, defendant filed a motion for reconsideration, arguing that this matter involved a series of transactions and thus was properly considered an installment contract. That is, plaintiff was paid after each individual scrap transaction rather than at the completion of the project. Accordingly, pursuant to MCL 600.5836, plaintiff's claims accrued as each separate installment fell due. See also *HJ Tucker & Assoc, Inc v Allied Chucker & Eng'g Co*, 234 Mich App 550, 577; 595 NW2d 176 (1999). Thus, the statute of limitations ran separately as to each allegedly overdue installment. A significant number of the transactions for which plaintiff sought compensation occurred over six years before this lawsuit was filed; thus, the statute of limitations expired on those transactions that occurred prior to September 30, 2005, and plaintiff was not entitled to recovery on such time-barred claims. At most, defendant argued, plaintiff was only entitled to $48,358.89 for transactions that occurred after September 30, 2005.

On November 5, 2012, the trial court entered an opinion and order allowing plaintiff to file a response to defendant's motion for reconsideration and, in his response, plaintiff argued that defendant never claimed in any of its pleadings that the agreement between the parties was an installment contract. Further, neither the agreement nor the amendment were installment contracts as evidenced by the fact that plaintiff was not regularly paid a definite amount or at a specific time; rather, he was paid "every once in a while," as Mosier admitted in his deposition. Moreover, neither the agreement nor the amendment provided a time provision regarding when the payments were "due." Thus, there was no way to determine when the statute of limitations

[2] This dismissal decision is not challenged on appeal.

began to run. In any case, plaintiff argued, defendant was not entitled to reconsideration of the trial court's order granting summary disposition in plaintiff's favor.

Defendant replied to plaintiff's response, arguing that the amended agreement was an installment contract because it did not involve a single transaction; rather, it involved a series of separate transactions. Further, defendant raised the affirmative defense that plaintiff's claims were barred by the statute of limitations; thus, plaintiff's argument that this issue was raised for the first time on reconsideration was without merit.

Subsequently, the trial court entered an order granting defendant's motion for reconsideration. The court held that the amended agreement between plaintiff and defendant was an installment contract; thus, the statute of limitations ran separately for each transaction. Accordingly, plaintiff's claims arising prior to October 1, 2005, were time-barred. The trial court partially vacated its prior order granting plaintiff summary disposition on the issue of damages and its finding that the statute of limitations argument was without merit. A trial on the issue of damages was scheduled, limited to plaintiff's claims arising on or after October 1, 2005.

At the bench trial conducted on December 11, 2012, the parties stipulated to the admission of a spreadsheet detailing the transactions related to the amended agreement. Plaintiff's counsel argued that all of the transactions totaled $1,412,143.98 and, according to the contract, the "expenses were set at $250,000." After subtracting the expenses, the net sales totaled $1,162,143.98. The distributions totaled $872,255.89, leaving an undistributed amount of $289,888.09. Plaintiff argued that he was entitled to half of that amount, totaling $144,944.04. Further, plaintiff argued, he was not seeking reimbursement for any transactions that occurred prior to September 30, 2005. Thus, plaintiff's calculation applied the $250,000 expense deduction to the total amount of the transactions related to the project.

Defendant argued that, in light of the trial court's holding that the amended agreement between the parties was an installment contract, plaintiff was actually overpaid because many transactions occurred prior to September 30, 2005 and, thus, should not be considered. Defendant agreed that the transactions totaled $1,412,143.98 and that $872,255.89 in sales revenue was distributed; thus, $539,888.09 was undistributed. However, $340,000 had to be deducted pursuant to the court's ruling because they occurred prior to September 30, 2005; thus, only $199,888.09 remained to be split in half. But, the expenses of $250,000 must also be deducted, leaving a negative balance; accordingly, plaintiff was not entitled to any distribution. The difference in the parties' arguments amounted to: at which point in the computation should the expense deduction of $250,000 be subtracted? Plaintiff argued that it should be deducted from the total amount of all of the transactions, while defendant argued that it should be deducted after the time-barred claims were taken into consideration.

On December 21, 2012, the trial court entered an opinion following the bench trial and made the following findings: (1) the total sales amounted to $1,412,143.98; (2) $772,255.89 in sales revenue was distributed prior to September 30, 2005, and was not in dispute; (3) the total amount of undistributed sales revenue was $639,888.09, but only $303,143.26 came due after September 30, 2005; (4) the statute of limitations barred plaintiff's claim for pre-September 30, 2005 revenue; (5) the $250,000 expense setoff should be proportionately applied between the pre- and post-September 30 undistributed revenue, thus, $120,000 of the setoff applied to the post-September 30 undistributed revenue; (6) subtracting $120,000 from $303,143.26 totaled $183,143.26, but there was a $100,000 distribution in October 2005 which must also be deducted; and (7) the net sales subject to division was $83,143.26, thus plaintiff was entitled to $41,572.63 in damages. On January 25, 2013, a judgment was entered consistent with the court's opinion. Thereafter, plaintiff filed his claim of appeal and defendant filed a cross-appeal.

We first address defendant's claim in its cross-appeal that the trial court properly determined that the amended agreement constituted an installment contract subject to the statute of limitations regarding such contracts, i.e., MCL 600.5836. We disagree.

As defendant notes, the trial court decided that the amended agreement was an installment contract when it granted defendant's motion for reconsideration of the order granting summary disposition in plaintiff's favor. We review a court's decision on a motion for reconsideration for an abuse of discretion. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). The interpretation of a contract presents a question of law that is reviewed de novo. *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

The primary goal of contract interpretation is to determine and enforce the intent of the parties. *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). The intent of the parties is ascertained by examining the language of the contract and according the language its plain and ordinary meaning. *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). Clear and unambiguous contractual language must be enforced as written. *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527; 791 NW2d 724 (2010).

The initial agreement between plaintiff and defendant provided:

> 3. OBLIGATIONS OF CURRIE: Currie shall assist Mosier with the removal and liquidation of the assets defined in the Hayes-Albion Agreement.
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> 4. PAYMENT AND ACCOUNTING. Mosier will pay Currie a monthly cash salary equal to FIFTY PERCENT (50%) of the net sales derived by Mosier in connection with the liquidation of the assets defined in the Hayes-Albion Agreement. For purposes of this Agreement, the term *net sales* shall mean that amount in excess of $225,000 plus reasonable expenses, which shall not exceed $250,000 unless otherwise agreed to by the parties to this Agreement. Mosier shall provide Currie with a weekly accounting of all sales and expenses made or incurred by Mosier.

The amendment to the agreement provided:

> 2. Paragraph 4 of the Agreement is amended as provided below:
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> "4. PAYMENT AND ACCOUNTING. Currie shall reimburse Mosier FIFTY PERCENT (50%) of the purchase price (i.e., $225,000.00) of the Hayes-Albion Agreement, which in no case shall exceed ONE HUNDRED TWELVE THOUSAND FIVE HUNDRED ($112,500.00) DOLLARS. Currie's reimbursement to Mosier shall be made following Mosier's full payment of the purchase price to Hayes-Albion or its designee. Thereafter, Mosier shall pay

> Currie, or cause to be delivered to Currie, FIFTY (50%) of the net sales derived by Mosier, Currie and/or their respective employees, agents and contractors in connection with the liquidation of the assets defined in the Hayes-Albion Agreement. For purposes of this Agreement, the term *net sales* shall mean that amount in excess of actual and reasonable expenses, that are agreed to by the parties, which shall in the aggregate not exceed $250,000 unless otherwise agreed to by the parties to this Agreement. Mosier and Currie agree to consult with each other concerning any sales or expenses that individually, or in the aggregate, exceed ONE THOUSAND ($1,000.00) DOLLARS, and Mosier agrees to provide Currie with a weekly accounting of all sales and expenses made or incurred by Mosier. Mosier and Currie represent to each other that there are no other parties to the Agreement, or that could assert rights to the Agreement."

According to the plain language of the original agreement, Currie was to *work for* Mosier and earn a "monthly cash salary" amounting to fifty percent of Mosier's net sales. However, the amendment clearly changed the relationship between Mosier and Currie from an employment relationship into a business associate relationship. Currie was to reimburse Mosier for half of the purchase price associated with the Hayes-Albion Agreement and then Currie became entitled to—as denoted by the word "shall"—fifty percent of their net sales. The amended agreement did not designate either the timing of the monetary distributions to Currie or the amount of those distributions. It is clear that the amended agreement was neither an installment contract nor similar to an installment contract.

An installment contract was defined in *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 532 n 5; 676 NW2d 616 (2004), quoting Black's Law Dictionary (7th ed) as: "'[a] contract requiring or authorizing the delivery of goods in separate lots, or payments in separate increments, to be separately accepted.'" Certain types of contracts requiring regular or periodic payments have been recognized as similar to or analogous to installment contracts. For example, in *Harris v City of Allen Park*, 193 Mich App 103; 483 NW2d 434 (1992), the plaintiffs were entitled to monthly pension payments from their former employer; thus, the payment of pension benefits were determined to be "similar to installment contracts." *Id*. at 107. The plaintiffs alleged that they were paid less than they were entitled to receive as a consequence of interest generated from their individual contributions. *Id*. at 105. This Court held that "every periodic payment made that is alleged to be less than the amount due plaintiffs . . . constitutes a continuing breach of contract and the limitation period runs from the due date of each payment." *Id*. at 107.

Similarly, in *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550; 595 NW2d 176 (1999), the contract at issue provided that the defendant would pay the plaintiff his earned sales commissions on a monthly basis. *Id*. at 554. The plaintiff alleged that he had always received five percent commission until the defendant improperly reduced his commissions; thus, plaintiff sought to recover the deficiency in the payments. *Id*. at 555. This Court held that the contract was analogous to an installment contract, noting that "the commissions earned by plaintiff were separately computed, were to be paid monthly, and were of a periodic nature." *Id*. at 563.

Likewise, in *Adams v City of Detroit*, 232 Mich App 701; 591 NW2d 67 (1998), the plaintiffs were retired city employees alleging breach of contract claims against the defendant because the defendant failed to pay their health insurance premiums as part of the plaintiffs' retirement packages. *Id*. at 703. The trial court disagreed with plaintiffs that, pursuant to the holding in *Harris*, 193 Mich App 103, "their retirement benefits should be likened to obligations under installment contracts, each deficient periodic payment constituting a separate breach of contract actionable for the following six years." *Adams*, 232 Mich App at 704-705. We reversed the trial court's holding, agreeing with the plaintiffs that a retirement plan is analogous to an installment contract. *Id*. at 705.

The amended agreement at issue in this case is clearly not similar or analogous to an installment contract, although the original agreement may have properly been considered so. Under the amended agreement, Mosier and Currie were equal business partners in the project and were to split the monetary proceeds derived from the sale of the equipment removed from the industrial complex, after expenses were deducted. While Currie was certainly entitled to half of the net proceeds, the amended agreement neither set forth any specific dollar amount to which he was entitled nor did it define the timing in which those amounts would be paid to Currie. That is, unlike the contracts at issue in *Harris*, *H J Tucker & Assoc, Inc*, and *Adams*, the amended agreement in this case did not require regular or periodic payments to be made to Currie. For example, Currie was not entitled to weekly, monthly, or quarterly payments of a sum certain; consequently, there was no date certain in which a payment was said to be "due."[3] And, unlike the plaintiffs in *Harris*, *H J Tucker & Assoc*, *Inc*, and *Adams*, Currie never asserted that his individual payments were deficient; rather, he alleged that defendant failed to pay him at all for certain transactions to which he was entitled to one-half of the net proceeds.

Consequently, the trial court abused its discretion when it granted defendant's motion for reconsideration after concluding that the amended agreement was an installment contract. Accordingly, contrary to the trial court's conclusion, plaintiff's claims arising prior to October 1, 2005, were not time-barred. That is, the statute of limitations applicable to installment contracts, MCL 600.5836, was not applicable to plaintiff's claims against defendant—plaintiff's business associate with regard to this project—for his fifty percent share of the net proceeds deriving from the "liquidation of the assets defined in the Hayes-Albion Agreement." It follows then that defendant's argument on cross-appeal that the trial court erred by awarding Currie any damages at all, because his claims against defendant were time-barred, is without merit. Accordingly, defendant is not entitled to appellate relief on his cross-appeal.

Next, we consider plaintiff's argument on appeal that the trial court failed to properly interpret the plain language of the parties' unambiguous amended agreement and, therefore, erroneously concluded that plaintiff was only entitled to an award of $41,572.63 in damages. We agree.

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[3] With regard to installment contracts, a claim on an installment contract does not generally accrue until the installment becomes due and "[t]he statutory period of limitation runs separately as to each installment as it becomes due." *Visioneering Inc Profit Sharing Trust v Belle River Joint Venture*, 149 Mich App 327, 333; 386 NW2d 185 (1986). In this case, there was no date certain in which an "installment" became "due."

This Court reviews for clear error the trial court's findings of fact following a bench trial, but its conclusions of law, including with regard to issues of contract interpretation, are reviewed de novo. *Trader v Comerica Bank*, 293 Mich App 210, 215; 809 NW2d 429 (2011); *Chelsea Invest Group LLC v City of Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010).

As plaintiff notes, the amended agreement provided:

> Mosier shall pay Currie, or cause to be delivered to Currie, FIFTY (50%) of the net sales derived by Mosier, Currie and/or their respective employees, agents and contractors in connection with the liquidation of the assets defined in the Hayes-Albion Agreement. For purposes of this Agreement, the term *net sales* shall mean that amount in excess of actual and reasonable expenses, that are agreed to by the parties, which shall in the aggregate not exceed $250,000 unless otherwise agreed to by the parties to this Agreement.

Thus, according to the plain and unambiguous terms of the amended agreement, Currie was entitled to fifty percent of the net sales derived from the liquidation of the subject assets and "net sales" meant the amount of proceeds in excess of $250,000—the undisputed amount of deductible expenses. Because the trial court erroneously concluded that the amended agreement was an installment contract and, thus, that some of plaintiff's claims were barred by the statute of limitations, the trial court's calculations of the amount owing to plaintiff by defendant were erroneous.

At the bench trial, the parties agreed that the total sales amounted to $1,412,143.98. Because Currie was entitled to fifty percent of the net sales, where "net sales" in this case means the amount of proceeds in excess of $250,000, the amount to be distributed between defendant and Currie was $1,162,143.98. The parties agreed at the bench trial that $872,255.89 was the total amount distributed between them. Therefore, the undistributed amount of sales revenue totals $289,888.09. Because Currie was entitled to half of that sales revenue, he was entitled to an award of $144,944.04 by the trial court. Thus, the trial court had properly granted plaintiff's motion for summary disposition and awarded plaintiff $144,944.04. Accordingly, we vacate the trial court's judgment entered following the bench trial in this matter and remand for reinstatement of the trial court's previous order granting plaintiff's motion for summary disposition and for entry of judgment consistent with this opinion.

Vacated and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff is entitled to costs as the prevailing party. See MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Cynthia Diane Stephens